In *Ilkiw* v. *Samuels* [1] a global figure of £2,000 was awarded for general damages, taking into account the claimant's disablement, reduction of earning capacity, pain and suffering and loss of amenities. I would do likewise in this case.

I acordingly reduce the award for actual loss of earnings from $8,400 to $2,200 and, in lieu of the general damages, which came to a total of $17,600, I would award a reduced sum of $8,800. In the result there will be judgment for the respondent for $11,916: costs of this appeal to the appellant.

**Barakbah L.P.** and **Azmi C.J. (Malaya)** concurred.

*Appeal allowed on issue of quantum of damages.*

Solicitors: *Richard Talalla & Co.; Yeap & Yeap.*

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## ABDULLAH v. PUBLIC PROSECUTOR

**[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and Ong Hock Thye F.J.) May 17, 1967]**

**[K.L. — Federal Court Criminal Appeal No. 5 of 1966]**

*Penal Code s. 302 — Murder — Defence of grave and sudden provocation — Summing-up — Burden of proof — Misdirection.*

The appellant was found guilty of murder by a majority verdict of the jury. It was not seriously disputed at the trial that the fatal injury on the neck of the deceased was inflicted by the appellant. There were several grounds of appeal, but the court dealt with only one ground, namely as to the judge's direction on the question of grave and sudden provocation. The learned judge in his summing-up on this defence had said: "however, when an accused person raises defences of the sort now raised, it shows that he wishes to bring himself within the exceptions provided by the law. Then the onus of proof shifts upon him."

**Held:** it was a misdirection in law to say that the burden is on the appellant to bring himself within the exceptions. Retrial ordered.

*Case referred to:—*

(1) *Looi Wooi Saik* v. *Public Prosecutor* [1962] M.L.J. 337.

FEDERAL COURT.

*C. Thambiah* for the appellant.

*Ajaib Singh* (Deputy Public Prosecutor) for the respondent.

**Azmi C.J. (Malaya)** (delivering oral judgment): The appellant was found guilty of murder under section 302 of the Penal Code by the jury by a majority verdict of 5 to 2. The learned judge expressed agreement with that verdict.

It was not seriously disputed at the trial that the fatal injury on the neck of the deceased was inflicted by the appellant.

He, however, raised the following defences, namely that if he did strike, the striking was accidental, (2) that if he did strike it was in self defence and (3) that if he did strike the deceased it was due to grave and sudden provocation.

The accused himself at the trial gave evidence on oath and told the court that the deceased challenged him to get down from his house so that he, the deceased, could cut him. At that time according to appellant, the deceased was carrying a parang and just as the appellant got down to the steps, deceased rushed and struck at him, whereupon the appellant dodged sideways and backwards and swung his own parang. He then ran away.

There were several grounds of appeal argued before us this morning, but in our view, it is sufficient if we deal with only one ground, namely as to the judge's direction on the question of provocation. The learned judge in his summing-up as to the defence put up by the appellant said as follows:—

> "However, when an accused person raises defences of the sort now raised, it shows that he wishes to bring himself within exceptions provided by the law. Then the onus of proof shifts upon him."

In our view, it is a misdirection in law to say that the burden is on the appellant to bring himself within the exceptions.

This court in *Looi Wooi Saik* v. *Public Prosecutor* [1] said as follows:—

> "At a later stage, however, when discussing the defence of provocation he said this:—
>
> > 'Now, the defence in this case as put up by counsel is that the accused killed the woman whilst he was deprived of his power of self-control by reason of a sudden and grave provocation, and the question whether there was such provocation is a question of fact for you to consider. I think I had better say it now that when you are considering the defence story you do so only on the balance of probabilities, that is to say, if you think that the defence story is reasonably true, then you must say that he has discharged that burden. The burden is certainly on him on this question of provocation. . .'
>
> In our view this direction was not correct".

Then further down the judgment Thomson C.J. (as he then was) went further on to say (at p. 340) as follows:—

> "In the case of murder where a defence such as provocation is set up there would seem to be a conflict of presumptions. On the one hand there is the presumption of innocence of the offence of murder which arises from section 101; on the other hand there is the presumption of the non-existence of provocation which arises from section 105. . . . In any event the only logical result is that the presumption of innocence must be the stronger. Where there is any reasonable doubt as to whether the accused person has brought himself within the exception of provocation that must in its turn create a doubt as to whether he is guilty of murder and, therefore, a prudent man would not regard that offence as proved against him.
>
> In the circumstances it is our view that the proper direction to a jury is that if the defence of provocation is to succeed there must be something to support it, either something in the prosecution evidence or some evidence

given by the defence which is capable of making it out. But if there is anything to support it then the burden which in the first place lies upon the defence of making it out is sufficiently discharged if the jury are left with a sense of reasonable doubt as to the existence or non-existence of the provocation."

In our view therefore, having regard to the circumstances of the case, the proper thing to do would be to set aside the conviction of murder and order a retrial.

*Conviction of murder set aside.*
*Retrial ordered.*

Solilcitors: *Xavier & Thambiah.*

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## *RE* TANG PUI SIM DECD.

[F.C. (Wee Chong Jin C.J., Tan Ah Tah F.J. and Buttrose J.) May 17, 1967]

[Singapore — Federal Court Civil Appeal No. Y15 of 1967]

*Probate and Administration — Grants made to next of kin and strangers — Application by next of kin to revoke grant made to strangers — Burden of proof — Locus standi of strangers — Grant made per incuriam — Probate and Administration Ordinance (Cap. 17), s. 18(3)(d).*

The deceased died intestate on the 12th August 1964 and both the appellants and the respondents petitioned for letters of administration. The appellants maintained that they were the lawful cousins and next of kin of the deceased. It was not in dispute that the respondents had no beneficial interest in the estate of the decased and were not the lawful next of kin but their petition for letters of administration was however made under section 18(3)(d) of the Probate and Administration Ordinance (Cap. 17). Both petitions came up before the registrar for hearing on the same day and both petitions were granted. The appellants then applied by way of motion to have the grant made to the respondents revoked. At the hearing of the motion the court ordered that the motion proceed as an action and pleadings be filed. The appellants in their pleadings claimed a declaration that they were the lawful cousins and next of kin of the deceased and that the grant of letters of administration to the respondents be revoked. The respondents on the other hand maintained that the appellants were not the lawful cousins and next of kin of the deceased and they sought a declaration accordingly and claimed that the grant of letters of administration to the appellants be revoked.

At the trial the appellants withdrew their claim for a declaration that they were the lawful cousins and next of kin of the deceased on the ground that it was redundant and unnecessary. They maintained that as they had been accepted by the registrar on their sworn evidence as the lawful cousins and next of kin the respondents should have been called upon to discharge the onus of proving their interest and disproving the appellants' interest. The trial judge after hearing arguments on both sides revoked the grants made to the appellants and respondents. On appeal by the appellants (the respondents did not appeal against the revocation of their grant),

**Held:** (1) the grant of letters of administration to the respondents was made *per incuriam*. As the grant made to them had been revoked and as they were neither next of kin nor did they have any interest in the estate of the deceased the respondents were in the position of strangers to the estate and in consequence had no *locus standi* and could not be heard to revoke the appellants' grant which was properly made by the registrar;

(2) in the circumstances it would be pointless and indeed a waste of time and futile to prolong these proceedings by sending the appellants back for further hearing. The decision of the trial judge revoking the grant of letters of administration to the appellants should be set aside and the grant to them restored.

*Case referred to:—*

(1) *Dabbs* v. *Chisman* (1810), 161 E.R. 946.

FEDERAL COURT.

*C. C. Tan* (*T. P. B. Menon* with him) for the appellants/plaintiffs.

*Kirpal Singh* for the respondents/defendants.

*Cur. Adv. Vult.*

The judgment of the Federal Court was read by,

**Buttrose J.:** This is an appeal by the plaintiffs from a decision of Choor Singh J. in a probate action instituted to determine who has the right to administer the estate of one Tang Pui Sim who died intestate on the 12th August, 1964.

The facts which give rise to these proceedings are these:—

In Probate No. 691 of 1964 the 1st defendant petitioned for a grant of letters of administration of the estate of the deceased to her and her daughter, the 2nd defendant. It was not in dispute that the defendants had no beneficial interest in the estate of the deceased and were not the next-of-kin and their petition was made under section 18(3)(d) of the Probate and Administration Ordinance (Cap. 17). They maintained that the deceased did not leave her surviving any issue or next-of-kin.

In Probate No. 753 of 1964 the plaintiffs petitioned for a grant of letters of administration of the estate of the deceased to them. They maintained that they were the lawful cousins and next-of-kin of the deceased.

Curiously enough both petitions came up before the registrar for hearing on the same day and for some extraordinary reason both were granted. One can only surmise that the grant of letters of administration to the defendants was made *per incuriam.*

The plaintiffs then applied by motion to have the grant made to the defendants revoked.

Subsequently the court ordered that the motion proceed as an action and pleadings were filed.

The plaintiffs claimed a declaration that they were the lawful cousins and next-of-kin of the deceased and that the grant of letters of administration to the defendants be revoked.

The defendants on the other hand maintained that the plaintiffs were not the lawful cousins